

GAO

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# Advance Sheets Volume 74

## Decisions of the Comptroller General of the United States

REPORT OF THE BOARD OF DIRECTORS

1943

THE BOARD OF DIRECTORS

OF THE COMPANY

RESPECTFULLY SUBMIT

THE FOLLOWING REPORT

FOR THE YEAR ENDING



## Decision

**Matter of:** International Shipbuilding, Inc.

**File:** B-257071.2

**Date:** December 16, 1994

Gary L. Thorman for the protester.  
Elizabeth Rivera Bagwell, Esq., for the Department of the Navy, the agency.  
David R. Kohler, Esq., and Susan L. Sundberg, Esq., for the Small Business Administration.  
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest challenging nonresponsibility determination on ground that agency's alleged failure to consider protester's financial information resulted in Small Business Administration's failure to receive vital information bearing on protester's financial capability is denied where: (1) small business protester failed to respond to three separate requests by contracting agency for financial information; and (2) Small Business Administration conducted its own investigation before affirming agency's determination that protester was nonresponsible.

### DECISION

International Shipbuilding, Inc. (ISI), protests the award of a contract to The Ogilvie Company under request for proposals (RFP) No. N0064-93-R-0110, issued by the Navy for 10 3-tier paint floats. ISI contends that it was improperly determined nonresponsible as a result of the Navy's failure to consider vital information regarding its financial capability; because of this alleged failure, ISI protests that the Small Business Administration (SBA) similarly overlooked the same vital information and therefore improperly affirmed the Navy's determination that ISI was nonresponsible.

We deny the protest.

## BACKGROUND

On October 5, 1993, the Navy issued the RFP as a total small business set-aside; by the November 30 closing date, 15 offers--including that of ISI--were received. From February 8 to March 7, 1994, the Navy conducted technical discussions with each offeror; because ISI's written response to these discussions was initially determined by the agency to be untimely, the protester was eliminated from further discussions. However, on April 13--in response to a protest filed by ISI at this Office--the Navy reinstated ISI's proposal in the competitive range, and issued a request for best and final offers (BAFO).

Based on the BAFOs received, ISI was the lowest-priced offeror; however, because ISI's price was more than \$150,000 lower than the next technically acceptable offeror--and because another offeror for a similar procurement was terminated for default by the agency based on its inability to perform at the price proposed by ISI--the contracting officer asked the Defense Contract Management Area Operations, Birmingham (DCMAO) to perform a pre-award survey of ISI, including an audit of ISI's accounting system, and a field pricing report to ascertain whether ISI's offered price was realistic.

To evaluate ISI's responsibility, DCMAO performed the following investigation. First, on May 17, DCMAO surveyed ISI's facilities and proposed site of performance; based on this inspection, DCMAO determined that although ISI--as part of a newly claimed joint venture with another company, Worldwide Marine--could technically perform this requirement, ISI's financial resources and independent technical qualifications were unproven. For example, the surveyors discovered that although ISI was incorporated in 1979 as a business engaged in the construction and repair of watercraft, it did not have any current commercial or government work, and consequently, the firm did not have a work force on site and would have to rely solely on subcontractors for contract performance. In addition, the pre-award surveyors discovered that under a recent contract that involved similar repair work to this requirement, the agency had terminated ISI's performance through a no-cost settlement due to ISI's inadequate cashflow; specifically, ISI's lack of financial resources had resulted in nonpayment of subcontractors and the firm's inability to complete the contract. Finally, although ISI represented to DCMAO that it had recently formed a joint venture with Worldwide Marine to perform this requirement, this joint venture relationship was not referenced anywhere in ISI's proposal--and in fact, the proposal under the RFP was submitted in ISI's name only.

Shortly after the site visit, DCMAO contacted ISI by telephone and requested a financial portfolio demonstrating the contractor's capability to finance its performance of this contract; according to the protester, because this request was not made in writing, ISI refused to respond and so advised DCMAO. DCMAO next submitted a facsimile request for a full financial and accounting audit. ISI agreed to a May 24 audit meeting with DCMAO; however, on that date, ISI advised DCMAO that it could not agree to the audit because its bookkeeper had to go to Florida to deal with a family illness. DCMAO and ISI rescheduled the audit for June 2; however, ISI again contacted DCMAO and advised the auditors that its bookkeeper was still unavailable, and that it had not yet had a chance to obtain any bookkeeping assistance for the audit. In response, DCMAO advised ISI to proceed with submitting its financial information and data in its raw form; however, ISI never complied with this request.

As a result of its concerns regarding ISI's performance, and ISI's failure to respond to the audit request, DCMAO issued a negative pre-award survey and responsibility evaluation of ISI. DCMAO's recommendation to the Navy that the agency not award this contract to ISI was primarily based on DCMAO's determination that ISI lacked the financial resources to successfully perform this contract.

On June 2, the agency notified ISI that it had been found nonresponsible. Where, as here, a small business is found nonresponsible, the matter must be referred to the SBA for review under the SBA's certificate of competency (COC) procedures since, under 15 U.S.C. § 637(b)(7) (1988), SBA has conclusive authority to determine a small business bidder's responsibility by issuing or refusing to issue a COC. Consequently, on June 13, the Navy referred the matter of ISI's nonresponsibility to the SBA Atlanta Regional Office for review, explaining that ISI was found nonresponsible due to inadequate financial and production capability.<sup>1</sup>

By letter dated June 16, SBA notified ISI of the basis for its nonresponsibility determination, and further advised the contractor that SBA would review the determination but that "[i]t must be emphasized and duly noted that the burden of demonstrating competency to perform is solely your responsibility." The letter also informed ISI that in order to appeal the Navy's nonresponsibility determination, the firm would have to complete and submit an attached "Application Instruction Sheet" which required the following

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<sup>1</sup>The Navy also concluded that ISI is not a regular dealer under the Walsh-Healey Act. SBA later found that ISI in fact is a regular dealer.

information to be provided to SBA: supplier and subcontractor information; completed contracts; present plant load; facilities and equipment; personnel resumes; itemization of all costs; production milestone chart; labor requirements and workload; engineering drawings and specifications; a copy of the firm's quality control manual; a copy of ISI's small business size determination; cash flow information; profit and loss statements; and balance sheets for the past 3 fiscal years.

In response to the December 16 letter, ISI provided SBA with a copy of its small business size determination, a completed COC application, information on a 1985 loan, income statements from 1991, 1992, and 1993, and balance sheets for these years. To allay concerns about its financial capability, ISI provided a proposed monthly cash flow chart listing \$591,500 in projected loans from Worldwide Marine for the period of August 1994 through May 1995 as well as a June 3 letter from Worldwide Marine notifying DCMAO that it would control all financial administration of this contract.

On June 30, an SBA industrial specialist conducted a plant survey of ISI's production capability; on July 6, an SBA financial officer completed a report analyzing the status of ISI. That same day, SBA received a letter from Worldwide Marine advising the government that Worldwide Marine had withdrawn from the joint venture with ISI, and would not provide any performance or support for this contract.

Based on their investigations, the SBA industrial specialist and financial analyst each separately determined that they could not recommend ISI for contract award. First, the SBA industrial specialist determined that ISI was not capable to perform based on: ISI's apparent lack of cash to purchase needed materials and pay staff; ISI's failure to provide letters of commitment for required personnel; and ISI's lack of a production plan and facilities in which to assemble the tier crafts. Similarly, the SBA financial analyst determined that based on his review of ISI's submitted balance sheets and profit/loss financial statements, ISI's firm had a "deficit of retained earnings and a deficit net worth." The analyst also noted that the profit shown on the interim financial statements was not consistent with ISI's fiscal year end statements, and that there was "no evidence of cash availability to perform the contract." Additionally, the SBA financial analyst reported that Dun & Bradstreet<sup>2</sup> rated ISI "very slow and high risk,"

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<sup>2</sup>Dun and Bradstreet is an independent reporting service that makes its reports available to the public for evaluating the financial positions of companies. Such

(continued...)

and concluded that as a high credit risk, ISI was unable to obtain credit accounts with suppliers. Finally, while ISI had stated that Worldwide Marine would pledge \$591,000 in loan money, ISI did not provide any documentation from Worldwide Marine to confirm the availability of these funds, i.e., a letter of credit. Based on these two SBA reports, the COC Review Committee unanimously recommended that SBA deny the COC on the grounds that ISI was not financially capable of performing this requirement.

By letter dated July 12, SBA notified ISI and the Navy that ISI's application for a COC was denied, thereby affirming the Navy's initial determination that ISI was nonresponsible. ISI subsequently filed this protest with our Office, reiterating its nonresponsibility challenge.

#### DISCUSSION

In order to be found responsible, a firm must, among other things, affirmatively demonstrate that it has sufficient financial resources to perform a contract, or the ability to obtain them. FAR §§ 9.104-1 and 9.104-3(b). Absent such a showing, the FAR requires the contracting officer to determine a firm nonresponsible. FAR § 9.103(b). Where a small business is found nonresponsible, the matter must be referred to the SBA. We do not review protests of such matters unless the protester indicates that SBA's action on a referral may have been taken fraudulently or in bad faith or that SBA failed to consider vital information bearing on the protester's responsibility. Pittman Mech. Contractors, Inc., B-241046.2, Feb. 1, 1991, 91-1 CPD ¶ 103.

In this case, although ISI maintains that the Navy's alleged failure to consider vital information bearing on ISI's financial capability misled the SBA into denying ISI's COC, we find no basis to question either the Navy's or SBA's determination that ISI is nonresponsible. First, the record contains absolutely no evidence showing bad faith on the part of either the Navy or SBA. Further, as noted above, the record unequivocally shows that despite three specific requests from the agency, ISI refused to provide the Navy with any information demonstrating its financial capability to perform this requirement. In fact, the only attempt made by ISI to ease the Navy's and SBA's concerns--ISI's attempted joint venture with Worldwide Marine--failed when Worldwide Marine withdrew all its support from this

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<sup>2</sup>(...continued)

reports are routinely used by contracting agencies in evaluating contractor responsibility. See Federal Acquisition Regulation (FAR) § 9.105-1(c)(5); Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158.

requirement. Finally, as noted above, two SBA officials conducted independent investigations of ISI's financial capability which were not influenced, in any way, by the Navy's alleged failure to obtain vital financial information bearing on ISI's responsibility--particularly since ISI was given the opportunity--in the SBA's COC application--to furnish convincing evidence of its financial capability to the SBA for consideration.

An agency is not required to delay award indefinitely until an offeror cures the causes of its nonresponsibility. See Aceves Constr. and Maintenance, Inc., B-233027, Jan. 4, 1989, 89-1 CPD ¶ 7. Under these circumstances, where the record shows that both the agency and SBA have fully considered and investigated all available information--and where the protester has failed to respond to or otherwise allay the agencies' concerns regarding its capability to perform--the subsequent determination that the contractor is nonresponsible is unobjectionable. See UAV Sys., Inc., B-255281; B-255281.2, Feb. 17, 1994, 94-1 CPD ¶ 121; Harvard Interiors Mfg. Co., B-247400, May 1, 1992, 92-1 CPD ¶ 413.

The protest is denied.

*Ronald Berger*  
for Robert P. Murphy  
General Counsel





## Decision

**Matter of:** Baker Support Services, Inc.

**File:** B-257054.2

**Date:** January 20, 1995

Stephen G. Southerland for the protester  
William A. Roberts, III, Esq., Lee P. Curtis, Esq., and  
Brian A. Darst, Esq., Howrey & Simon, for J. A. Jones  
Management Services, Inc., an interested party.  
Georgia Vlahos, Esq., Diane D. Hayden, Esq., and Paul M.  
Fisher, Esq., for the Department of the Navy.  
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office  
of the General Counsel, GAO, participated in the preparation  
of the decision.

### DIGEST

1. Protest that agency improperly evaluated protester's proposal is denied where the record shows that the agency evaluated the protester's proposal in accordance with the evaluation criteria set forth in the solicitation and supports the reasonableness of the agency's overall technical rating of the protester's proposal as "marginal."
2. Where solicitation announced that the Department of the Navy intended to evaluate proposals and make award on the basis of initial proposals without conducting discussions, and agency's evaluation of the protester's proposal as "marginal" overall was reasonable and in accordance with the solicitation's evaluation criteria, the agency was not required to conduct discussions with the protester and properly made award to a technically superior, higher-priced offeror on the basis of initial proposals.

### DECISION

Baker Support Services, Inc. protests the award of a contract to J. A. Jones Management Services, Inc. under request for proposals (RFP) No. N62467-93-R-7926, issued by the Department of the Navy for base operation services at the Naval Ordnance Station, Louisville, Kentucky. Baker contends that the agency improperly evaluated its proposal. The protester also argues that award to Jones without conducting discussions was improper.

We deny the protest.

PUBLISHED DECISION  
74 Comp. Gen. \_\_\_\_\_

## BACKGROUND

The RFP contemplated the award of a combination firm, fixed-price, indefinite quantity contract for a base year with up to four 1-year option periods. The RFP sought proposals to provide all labor, supervision, engineering services, tools, materials, equipment and transportation necessary to operate, maintain and repair the facilities, equipment, supplies, and systems described in the RFP. Offerors were required to submit separate technical and price proposals.

The RFP divided the contractor's responsibilities into 15 functional areas called "annexes."<sup>1</sup> For each annex, the RFP instructed offerors to complete an "OFFEROR'S EXPERIENCE FORM" and a "PROPOSAL FORM," included as attachments to the solicitation. By completing these forms, offerors were to illustrate their experience in providing the services related to each annex, or discuss other appropriate services in government or comparable civilian projects similar in scope, size, and complexity.

The "PROPOSAL FORM" required offerors to address questions or specific issues pertaining to each annex. Specifically, as relevant to this protest, the RFP instructed offerors "to respond to the issue succinctly demonstrating an understanding of the work of the annex." The RFP further stated in bold lettering that "[t]he rationale for the stated FTEs [full-time equivalent employees] and material planned must be clearly presented for each annex." Offerors were also required to submit an organizational chart illustrating the resources that would be dedicated to the contract.

For each contract period, section B of the RFP required offerors to submit a total price for the fixed-price portion of the work, contract line item number (CLIN) 0001; a total price for the indefinite quantity portions of the contract, CLINs 0002 through 0005; and a grand total price, CLINs 0001 through 0005. In order to facilitate the agency's evaluation of the fixed-price portion of proposals, offerors were required to provide supplemental pricing information by completing charts included in section B of the RFP which listed each of the 15 annexes separately. For each annex

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<sup>1</sup>For example: annex 1, administrative requirements; annex 2, transportation; annex 3, maintenance and repair of railroad trackage; annex 4, maintenance and repair of cranes; annex 5, maintenance and repair of grounds and surfaced areas, etc. The technical exhibits for each annex provided estimated work loads, projected requirements, and/or historical data.

offerors were required to submit direct labor and material costs, and indicate proposed numbers of direct labor FTE employees identified as separate sub-line items for each annex, and total costs for each annex. Price proposals were to clearly support the resources proposed in the technical proposal. Offerors were required to provide their rationale for each of the fixed-price and indefinite quantity CLINs for each annex.

Section M of the RFP identified technical and price as the two evaluation factors, each being of equal importance. Under the technical factor, the RFP listed the following evaluation subfactors, each of equal importance:

(a) experience; (b) understanding and methods; and (c) resources. Award was to be made to the responsible offeror whose offer conforming to the solicitation was considered most advantageous to the government.

The agency received five proposals by the time set on June 10, 1994 for receipt of initial proposals. A technical evaluation board (TEB) rated technical proposals by assigning adjectival ratings--Highly Satisfactory (HS), Acceptable (A), Marginal (M), or Unacceptable (U)--under each technical evaluation subfactor listed in the RFP, and assigning an overall rating as shown below. The results of the evaluation were:

<u>Offeror</u>	<u>Price</u>	<u>Subfactor Rating</u> <u>(a) / (b) / (c)</u>	<u>Overall</u> <u>Rating</u>
Baker	\$14,258,007	HS/M/A	Marginal
B	14,285,740	A/M/M	Marginal
Jones	15,901,584	HS/A/HS	Acceptable
C	16,677,383	M/U/M	Unacceptable
D	24,448,526	A/A/A	Acceptable

A price evaluation board (PEB) separately evaluated price proposals. Of the five proposals reviewed, the PEB concluded that only the proposal submitted by Jones was acceptable from a price perspective. The PEB had significant concerns with the other four proposals, including the protester's, and concluded that Baker's proposal was "seriously impractical."

Based on the results of the technical and price evaluations, the source selection board (SSB) considered Baker's proposal "seriously impractical," particularly with respect to the protester's proposed FTEs. The SSB concurred with the TEB's overall rating of the protester's proposal as marginal, and recommended to the source selection authority (SSA) that Baker's proposal not be considered further. The SSB further concurred with the TEB's rating of Jones's proposal as acceptable, and recommended that award be made to that firm without conducting discussions. The SSA concurred with that

recommendation, and on September 2, the agency awarded the contract to Jones. Baker subsequently filed an agency-level protest which the Navy denied. Baker then filed this protest in our Office.

#### PROTESTER'S CONTENTIONS

Baker argues that the TEB improperly evaluated its proposal. Baker maintains that the TEB's concerns over its proposed FTEs were unwarranted because the problem was the result of a minor clerical error in its proposal. The protester also contends that the agency evaluators overlooked a section in its proposal in which Baker explained its overall rationale for arriving at its proposed staffing levels which should have overcome the TEB's concerns regarding its FTE levels. The protester also argues that the agency improperly awarded the contract to Jones on the basis of initial proposals without conducting discussions.

#### DISCUSSION

##### Proposal Evaluation

The evaluation of technical proposals is the function of the contracting agency; our review of an allegedly improper evaluation is limited to determining whether the evaluation was reasonable and consistent with the stated evaluation criteria. CORVAC, Inc., B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454. Mere disagreement with the agency's evaluation does not render the evaluation unreasonable. Id. Here, we find that the record supports the reasonableness of the agency's evaluation of Baker's proposal.

The TEB found that Baker's proposal did not clearly establish an organizational structure responsive to the work in each annex, and that the staffing levels as reflected in its proposed FTEs were "ambitious." In this connection, the agency considered Baker's proposed FTEs for nonmanagement personnel to be overall "grossly underestimated" when compared with the government's estimates for those positions, leading the evaluators to conclude that Baker either misunderstood the requirement or had proposed insufficient staffing.

The TEB also was concerned that the number of total hours Baker proposed in its technical proposal did not coincide with the FTEs Baker listed in section B of its proposal. The TEB concluded that based on its review of the protester's proposed staffing levels, it appeared that Baker "was reverting back to the requirements envisioned in [its] previous contract," rather than proposing staff on the basis of the current requirement. Further, of significant concern to the TEB was that Baker did not provide in its proposal a

narrative explanation of its rationale for its proposed FTEs for each of the 15 annexes, lending further support to the evaluators' conclusion that Baker did not understand the RFP's requirements.

In view of the RFP's clear requirement for offerors to provide a rationale explaining their proposed FTEs, and given Baker's lack of explanation for what the evaluators considered "grossly underestimated" staffing levels, the TEB reasonably downgraded the protester's proposal under technical evaluation subfactor (b), "understanding and methods," awarding the firm's proposal a rating of "marginal" under this area.

The protester concedes that for two annexes (9a and 9b), its proposed FTE hours "did not coincide" with the hours listed in section B of its proposal. The protester explains, however, that this was a clerical error that the agency evaluators should have discovered and allowed Baker to correct. With respect to a lack of a narrative explanation for the proposed FTEs for each annex, Baker explains that rather than providing a rationale for each of the 15 annexes, as required by the RFP, it provided a brief explanation covering its overall FTE rationale which, since it is an experienced contractor providing these services, should have been sufficient to overcome the evaluators' concerns regarding its proposed staffing.

The protester's argument that the agency should have realized that Baker had made a mistake in its proposal regarding annexes 9a and 9b, and that the evaluators should have considered its overall FTE rationale sufficient to overcome its concerns, is without merit. It is incumbent on an offeror to submit an adequately written proposal for the agency to evaluate. See A Plus Servs. Unlimited, B-255198.2, Jan. 31, 1994, 94-1 CPD ¶ 52. No matter how competent a contractor may be, the agency may elect to base an offeror's technical evaluation entirely on the information in or submitted with the proposal. See SeaSpace Corp., B-252476.2, June 14, 1993, 93-1 CPD ¶ 462. The RFP clearly required offerors to provide direct FTEs and direct labor costs for each annex, as separate sub-line items, to allow the agency to evaluate whether the offeror proposed sufficient staffing and resources. Since Baker admits that it did not comply with these clear instructions with respect to annex number 9, there is no basis to object to the TEB's evaluation of Baker's proposal as to the "understanding and methods" subfactor.

The RFP further required that "[t]he rationale for the stated FTEs and material planned must be clearly presented for each annex." Rather than providing a narrative explaining how it arrived at its proposed FTE levels for

each annex, Baker opted to provide a fairly brief paragraph allegedly setting forth its overall staffing rationale. Since the RFP placed the burden on Baker to submit an initial proposal that adequately demonstrated the firm's understanding of the requirements, including an explanation for the FTE levels proposed for each annex, the protester ran the risk of having its proposal downgraded by failing to do so. See DRT Assocs., Inc., B-237070, Jan. 11, 1990, 90-1 CPD ¶ 47.

The protester argues that given the "highly satisfactory" rating its proposal earned under the experience evaluation subfactor, and given the "acceptable" rating under the resources subfactor, its proposal does not warrant an overall rating of "marginal." We disagree.

The evaluation documents show that both the TEB and PEB considered the lack of FTE rationale in Baker's proposal to be a fundamental flaw which affected all 15 annexes, from both a technical and a price perspective, and which rendered its proposal essentially unacceptable. From a technical perspective, the TEB found that Baker had not clearly established an organizational structure responsive to each annex. The TEB summary evaluation documents show that the evaluators were seriously concerned that Baker had not clearly demonstrated "a satisfactory approach to performing the work." The TEB concluded that Baker's rationale supporting labor, material, and equipment was "marginally acceptable" and "unclear," and that revisions would have to be made to render the proposal acceptable, suggesting that the TEB considered Baker's proposal unacceptable in this regard.

Similarly, with respect to price, the PEB concluded that Baker's price proposal was "seriously impractical." The PEB considered that: the number of proposed FTEs for nonmanagement personnel was grossly underestimated; Baker proposed no FTEs and no price for direct labor for annex 9b; and Baker proposed a high overall cost per employee, suggesting to the PEB that perhaps Baker had proposed insufficient staffing.

Based on the results of the TEB and PEB evaluations, the SSB found that the deficiencies concerning proposed staffing were significant, and that FTEs would have to be adjusted upward in order for Baker's proposal to become acceptable in this area. As a result, the SSB recommended that Baker's proposal not be considered for award. Thus, despite the rating of "marginal" assigned Baker's proposal under the "understanding and methods" evaluation subfactor, it is clear that both the PEB and the TEB considered Baker's proposal so deficient with respect to its FTEs and lack of supporting rationale, that its proposal was considered

unacceptable in this regard. Notwithstanding the "highly satisfactory" rating Baker's proposal earned under the experience evaluation subfactor, and given the "acceptable" rating assigned under the resources subfactor, in view of the evaluators' concern over Baker's proposed staffing, the TEB reasonably rated the protester's proposal "marginal" overall.

### Discussions

Baker argues that the agency improperly awarded a contract to a higher-priced offeror without conducting discussions. The protester argues that given the evaluators' concern over its proposed staffing, and in view of its experience as a contractor providing the required services, the agency should have afforded Baker an opportunity to explain its rationale for the proposed FTE and clarify the alleged clerical error in its proposal, which would have raised its rating for subfactor (b) and its overall proposal rating above "marginal."

A Department of Defense contracting agency may make an award on the basis of initial proposals and not conduct discussions or allow offerors to revise their proposals where the solicitation advises that proposals are intended to be evaluated, and award made, without discussions with the offerors, unless discussions are determined to be necessary. 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. V 1993); FAR § 15.610(a)(4).<sup>2</sup> Here, section L of the RFP incorporated by reference FAR § 52.215-16, Alternate III, which specifically advises offerors that the agency intends to evaluate proposals and award a contract without discussions, and warns offerors to submit their best terms from a price and technical standpoint in their initial proposals.<sup>3</sup> Moreover, the RFP instructed offerors to

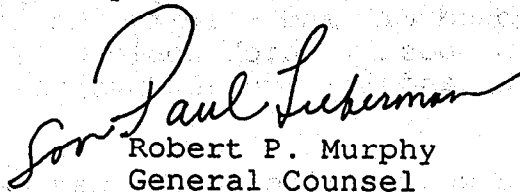
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<sup>2</sup>For Department of Defense, Coast Guard, and National Aeronautics and Space Administration procurements, the requirement that an award on the basis of initial proposals result in the lowest overall cost to the government has been eliminated. See FAR § 15.610(a)(3).

<sup>3</sup>Although the RFP incorporated by reference Alternate III, and indicated that Alternate III was to be found in section M of the RFP, paragraph M.3 of the RFP inadvertently contained FAR § 52.215-16(c) Alternate II, which states that the government intends to conduct discussions. While the RFP appears to have been unclear in this regard, since this ambiguity was apparent on the face of the RFP, Baker was required to seek clarification with respect to the agency's intentions or file a protest prior to the closing date. See (continued...)

clearly demonstrate in the "PROPOSAL FORM" how they planned to comply with the RFP requirements, including a full explanation of the staffing rationale for each annex. Thus, all offerors, including Baker, were on notice that the agency might not conduct discussions, and that their initial proposals should contain the most favorable terms they were prepared to offer. As discussed above, the agency's evaluation of Baker's proposal as "marginal" under the "understanding and methods" section and "marginal" overall was reasonable. Under these circumstances, the agency was not required to conduct discussions with Baker, and could properly determine that the awardee's higher-rated, slightly higher-priced proposal was most advantageous to the government. See, e.g., A Plus Servs. Unlimited, supra.

The protest is denied.

  
Robert P. Murphy  
General Counsel

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<sup>3</sup>(...continued)

4 C.F.R. § 21.2(a)(1) (1994); ADT Sec. Sys., Inc., B-249932.2, Feb. 4, 1993, 93-1 CPD ¶ 100.





Washington, D.C. 20548

## Decision

**Matter of:** Butt Construction Co., Inc.

**File:** B-258507

**Date:** January 30, 1995

Robert Martin, Esq., Simon, Turnbull & Martin, for the protester.

Lester Edelman, Esq., and Hal Perloff, Esq., Department of the Army, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest challenging agency's rejection of facsimile bid modification as late is sustained on grounds that government mishandling was paramount cause of modification's late receipt where: (1) facsimile bid modification was received at least 7 minutes prior to bid opening time; (2) the facsimile machine was located a short distance from both the room designated in the solicitation for receipt of bids and the bid opening room; (3) the protester properly identified the bid modification as directed by the solicitation and provided timely telephone notice to the agency of its facsimile transmission; and (4) record establishes that mail room clerks unreasonably delayed promptly delivering the modification.

### DECISION

Butt Construction Co., Inc. protests the Army Corps of Engineers' rejection of its bid modification as late under invitation for bids (IFB) No. DACA27-94-B-0090, issued for renovations at Page Manor School, located at Wright Patterson Air Force Base, Ohio. Butt contends that government mishandling improperly prevented the agency from considering its timely submitted facsimile bid modification.

We sustain the protest.

The IFB was issued on August 5, 1994. The required renovations consisted of demolition work, plumbing and electrical system upgrades, the installation of new mechanical equipment, and some site work. Of significance

For the Decision  
74 Comp. Gen. \_\_\_\_\_

here, section L of the IFB set forth the following "MODIFICATION OF BIDS BY TELETYPE OR FACSIMILE" provision which stated that:

"Bidders may modify their bids at any time by facsimile or teletype prior to the time set for opening bids. For the convenience of bidders desiring to modify their bids prior to bid opening, bidders may transmit their modification to Louisville District by Facsimile on (502) 582-5281 or (502) 582-5697.

"Bidders doing so are still responsible that the modification is dispatched in sufficient time to reach the destination prior to time set for opening of bids."<sup>1</sup>

In this regard, the IFB identified the "destination" as room 821 at the facility, and listed the facility's full street address.

On the morning of September 15, Butt submitted its bid; however, shortly thereafter, Butt received several revised estimates from some of its prospective subcontractors for this project which offered to perform the required work at lower prices. As a result, Butt recalculated its bid to a substantially lower price. Approximately 30 minutes prior to the scheduled 2:00 p.m. bid opening time, Butt attempted to send a facsimile transmission of its bid price modification to the facsimile telephone number set forth in the IFB, as permitted by the solicitation.

Because the transmission was not proceeding, Butt telephoned the facsimile machine site where a mail room clerk reported that because of a paper jam in the agency's facsimile machine, no facsimile transmissions--including Butt's bid modification--had been received. The clerk advised Butt to resend the facsimile modification, which the protester did. However, the facsimile machine paper feeder mechanism again malfunctioned, and, consequently, Butt's second facsimile transmission attempt was unsuccessful.

Following correction of the second paper jam by the clerk, Butt sent a third facsimile transmission of its 1-page bid modification, which was successful. The time legend printed at the top of the third facsimile transmission indicates that it arrived at the agency facsimile machine at 1:52 p.m.

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<sup>1</sup>Although this IFB authorized facsimile bid modifications, it did not, as envisioned by regulations, authorize facsimile bids. See American Eagle Industries, Inc., B-256907, Aug. 8, 1994, 94-2 CPD ¶ 156, n.1.

According to the clerk, because Butt had repeatedly emphasized that this facsimile transmission had to be submitted by 2:00 p.m. for the Page Manor school bid opening, the clerk placed the facsimile transmission in an envelope--time-stamped 1:52 p.m.--for delivery to the bid opening room--which was located approximately 150 feet around the corner from the mail room. A fourth transmission of the same 1-page Butt bid modification arrived--according to the transmission's time legend--at 1:54 p.m.

Shortly thereafter, the mail room clerk (hereinafter clerk No. 1) handed the time stamped envelope containing the bid modification to another mail room clerk (clerk No. 2) and instructed him to deliver the envelope "to the bid opening right away." Upon receiving the envelope, instead of delivering the bid modification to the bid opening room, clerk No. 2 delivered the envelope to room 821--the contracting division office--located 65 feet down the hall from the mail room.

Although bids and related documents are typically delivered to the contracting division receptionist, located at the Room 821 doorway, in this case, clerk No. 2 took the bid modification envelope to the contracting division secretary's office--located in the back of room 821. When the clerk discovered that the secretary was not at her desk, the clerk returned to the receptionist's desk and was told to deliver the bid modification envelope to the bid opening room, which is directly adjacent to room 821. The clerk then proceeded to the bid opening room and attempted to hand the envelope to the bid opening officer, who refused to accept it because bids had already been opened.<sup>2</sup>

As a general rule, a bid received in the office designated for the receipt of bids after the time set for bid opening is a late bid, and cannot be considered for award. See R. C. Construction Co., Inc. and Charles M. Powers and John H. Powers, a Joint Venture, B-250037.2, Feb. 24, 1993. An exception is made for mailed or facsimile bids (or modifications) if they do not arrive at the office designated in the IFB by the time set for bid opening solely because of government mishandling at the contracting installation. Federal Acquisition Regulation (FAR) § 14.304-1. Where, however, a bidder chooses to submit a facsimile bid or modification, the government is not responsible for transmission or related problems that result in a late bid. FAR § 52.214-31. On this record, we

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<sup>2</sup>In its modification, Butt deducted \$1.7 million from its bid. As modified, Butt's bid (\$3,575,000) is \$22,000 lower than the next low bid (\$3,597,000).

conclude that Butt's bid modification was presented to contracting officials after bid opening solely because of government mishandling.

The record establishes that Butt's modification was received at least 7 minutes prior to the bid opening time. The agency's own evidence--the time/date stamp on the envelope and the time legend on the facsimile transmission--shows that the modification was received at 1:52 p.m.<sup>3</sup> Next, the telephone records provided by Butt show that the first facsimile transmission ended at 1:53 p.m. Additionally, the time log for the facsimile machine from which Butt's bid modification was sent shows that the transmission started at 1:51 p.m. and lasted for 43 seconds. In sum, we find that Butt's first facsimile bid modification was received at least 7 minutes prior to the 2:00 p.m. bid opening--or at 1:53 p.m.

Under the circumstances here, the modification arrived in sufficient time to be delivered to the proper location. Bidders, of course, must allow a reasonable time for bids to be delivered from the point of receipt to the proper location, see Bay Shipbuilding Corp., B-240301, Oct. 30, 1990, 91-1 CPD ¶ 161; Silvics, Inc., B-225299, Feb. 24, 1987, 87-1 CPD ¶ 204. When a bid is sent by mail, the bid typically will be received in an agency mail room or similar facility and will be routed from there to the procurement office, the usual location designated in IFBs for delivery of bids. A bidder who does not mail a bid sufficiently in advance of bid opening, e.g., mails the bid only one government working day prior to bid opening, runs the risk that the agency's reasonable internal delivery procedures will not get the bid to the proper location by the scheduled bid opening. Bay Shipbuilding Corp., supra. When facsimile transmission is authorized, however, it is not unreasonable for bidders to expect that they can take advantage of that technology shortly before the bid opening--the transmission normally consumes very little time (here less than a minute), and agencies, before authorizing facsimile bids, are expected to have in place adequate procedures for ensuring timely delivery of such bids upon receipt. See FAR § 14.202-7(a) (5).

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<sup>3</sup>While the agency claims that the mail clerk allegedly pre-time stamped the envelope with 1:52 p.m., and suggests that the time/date stamp clock was several minutes slow--and on this ground argues that the first bid modification was received at a later time than 1:52 p.m.--we find this evidence unpersuasive in light of the legend printed on the first bid modification facsimile.

The Corps did have appropriate procedures in place for delivery of facsimile bid modifications to the bid room. Specifically, a mail clerk is available to monitor, record, and deliver incoming facsimile transmissions to the receptionist located at the entrance of room 821. Apparently, where--as here--potential bidders notify the mail clerk of an imminent bid opening, the agency's practice is to deliver the facsimile bid document immediately to the bid opening room officer instead of to the room 821 receptionist.

Here, Butt's modification was delivered late because these procedures were not followed. The mail room clerk who received Butt's bid modification and who was on notice of the urgency of the situation did not immediately seek to effect delivery.<sup>4</sup> Instead, delivery was delayed when the second mail room clerk failed to ascertain where the bid modification was to be delivered and searched the contracting division office for the division secretary, rather than proceeding directly to the adjacent bid opening room or delivering the modification to the receptionist at room 821.

But for the clerks' delay, Butt's bid modification would have been timely delivered. The record shows that 7 minutes is sufficient time for walking directly to the bid opening room (approximately 150 feet away), or to first the receptionist in room 821 (approximately 65 feet away), and then to the bid opening room next door. Since it was only the delay by the mail clerks that prevented the timely receipt of Butt's bid modification, we conclude that government mishandling was the paramount cause of the late receipt.

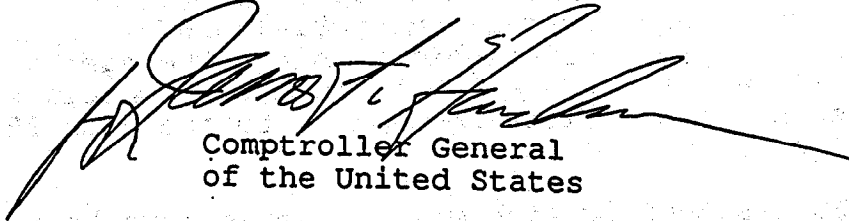
We sustain the protest and recommend that, if otherwise appropriate, award be made to Butt at its modified price. We also find Butt entitled to the costs of filing and pursuing its bid protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). In accordance with 4 C.F.R. § 21.6(f)(1), Butt's certified claim for costs,

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<sup>4</sup>In fact, the mail room clerk did not deliver the modification until after a second transmission was received from Butt; no explanation is offered by the agency for this delay.

detailing the time expended and the costs incurred, must be submitted to the Army within 60 days after receipt of this decision.

The protest is sustained.



Comptroller General  
of the United States



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Bollinger Machine Shop and Shipyard, Inc.  
**File:** B-258563; B-259265  
**Date:** January 31, 1995

Marcus B. Slater, Jr., Esq., and Jennifer J. Zeien, Esq.,  
Fort & Schlefer, for the protester.  
Robert A. Evers, Esq., and L. Stephen Quatannens, Esq.,  
Gardner, Carton & Douglas, for Hike Metal Products, Ltd., an  
interested party.  
Danielle M. Conway, Esq., U.S. Army Corps of Engineers, for  
the agency.  
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody,  
Esq., Office of the General Counsel, GAO, participated in  
the preparation of the decision.

### DIGEST

Protest challenging agency's failure to set procurement  
aside for small businesses is sustained where agency  
anticipated the receipt of bids from at least two small  
businesses and did not have a reasonable basis for  
concluding that award at a fair market price could not be  
expected.

### DECISION

Bollinger Machine Shop and Shipyard, Inc. protests the  
failure of the U.S. Army Corps of Engineers to set aside for  
exclusive small business participation invitation for bids  
(IFB) No. DACW61-94-B-0027, for design and construction of a  
fisheries research vessel. Bollinger also protests the  
agency's failure to include in the IFB notification that the  
procurement is subject to the requirements of 10 U.S.C.  
§ 7309 (Supp. V 1993), a provision prohibiting construction  
of vessels for any of the armed forces in foreign shipyards.

We sustain the protest.

### BACKGROUND

The Corps of Engineers conducted this procurement on behalf  
of the Department of the Interior, National Biological  
Survey (formerly the Fish and Wildlife Service (FWS)).  
Prior to issuing the solicitation, the Corps issued--and  
subsequently canceled--IFB No. DACW61-94-B-0006, which also  
requested bids for the design and construction of a

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fisheries research vessel.<sup>1</sup> The earlier IFB was issued on an unrestricted basis and included a clause instructing bidders that pursuant to 10 U.S.C. § 7309, construction of the vessel in a foreign shipyard was prohibited.<sup>2</sup> Seven bidders responded by the December 8, 1993 opening date with the following prices and indicated size status:

<u>Bidder</u>	<u>Small Bus.</u>	<u>83' Vessel</u>	<u>93' Vessel</u>
American Shipyard	Yes	\$2,197,000	\$2,249,000
Hike Metal Products	Yes	\$2,343,977	\$2,421,711
Bollinger Machine	Yes	\$2,988,892	\$3,081,409
Halter Marine	No	\$3,021,500	\$3,151,805
Peterson Builders	Yes	\$3,055,612	\$3,115,983
Marinette Marine	Yes	\$3,500,000	\$3,589,842
Bender Shipbuilding	Yes	\$4,007,655	\$4,219,450

The Corps rejected the two lowest bids because the bidders had failed to submit bid bonds in the required amount. The remaining bids exceeded the amount--\$2,980,000--that FWS had available for the procurement during fiscal year 1994. The Corps also determined that the specifications required revision. It therefore rejected all of the remaining bids and canceled the solicitation on February 28, 1994.

On April 29, 1994, the Corps issued IFB No. DACW61-94-B-0027, with a bid opening date of June 2, which was subsequently extended to September 14. The new solicitation, which sought bids for a faster 93-foot vessel, did not contain a provision advising bidders that construction of the vessel in a foreign shipyard was prohibited. The solicitation was initially set aside for small business concerns since the agency anticipated receipt of reasonably priced bids from two small businesses, Hike and Bollinger. Specifically, according to the Corps, the contracting officer expected that Hike would correct its bond defects and that Bollinger would make an effort "to come within the funds available for the project," but that

<sup>1</sup>The earlier IFB requested bids on an 83-foot vessel and included an option to increase the boat length by 10 feet.

<sup>2</sup>10 U.S.C. § 7309(a) provides as follows:

"Except as provided in subsection (b) [which authorizes the President to grant exceptions to the prohibition when he determines that it is in the interest of national security to do so], no vessel to be constructed for any of the armed forces, and no major component of the hull or superstructure of any such vessel, may be constructed in a foreign shipyard."



American Shipyard, the low bidder under the earlier IFB, would be incapable of obtaining the required bonding and that the other small business concerns she earlier solicited would not submit bids within the funding available.

After the Small Business Administration (SBA) notified the contracting officer that Hike, a Canadian corporation, could not be considered a small business because it did not have a shipyard located in the United States,<sup>3</sup> she determined that reasonably priced bids from two small businesses within the funding available could no longer be anticipated; the Corps accordingly amended the IFB on May 6 to withdraw the small business set-aside.

On May 19, Bollinger filed an agency-level protest objecting to the cancellation of the original solicitation, to withdrawal of the set-aside restriction on the second solicitation, and to the omission from the second IFB of a clause prohibiting construction of the vessel in a foreign shipyard. By decision dated September 8, the agency dismissed in part and denied in part the protest.

On September 14, the agency proceeded with bid opening. Five bids were received as follows:

<u>Bidder</u>	<u>Small Business</u>	<u>Price</u>
Hike Metal Products	No	\$2,938,451
Bollinger	Yes	\$3,181,982
Peterson Builders	Yes	\$3,190,052
Trinity Marine/ Halter Marine	No	\$3,482,823
North Florida Shipyard	Yes	\$5,013,967

On September 21, Bollinger filed a protest with our office, renewing its assertions that the procurement should have been set aside for small business competition and that the IFB should have been restricted to performance in the United States pursuant to 10 U.S.C. § 7309.<sup>4</sup>

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<sup>3</sup>See 13 C.F.R. § 121.403(a) (1994).

<sup>4</sup>On November 7, after receiving the agency report responding to its September 21 protest, Bollinger filed a second protest with our Office objecting to the cancellation of IFB -0006. The protester argued that it had not become aware of its grounds for objecting to the cancellation until it received the agency report, which included documentation that--according to the protester--established that sufficient funding had in fact been available at the time the agency canceled the original solicitation. (The

(continued...)

## ANALYSIS

As a general rule, a procurement must be set aside for small businesses where the contracting officer determines that there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market price. Federal Acquisition Regulation (FAR) § 19.502-2(a). For the most part, we view this determination as a business judgment within the contracting officer's discretion. FKW Inc. Sys., 68 Comp. Gen. 541 (1989), 89-2 CPD ¶ 32. We will examine the record to determine whether the agency made reasonable efforts to identify prospective small business bidders with the required capabilities, however. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53. In addition, where an agency declines to set aside a procurement on the basis that award at a fair market price cannot be expected (despite the fact that bids from two or more small businesses are anticipated), we will examine the record to determine whether the agency had a reasonable basis for this conclusion. Neal R. Gross and Co, Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269; Ann Riley & Assocs., Ltd., 71 Comp. Gen. 117 (1991), 91-2 CPD ¶ 544, recon. denied, Ace-Fed. Reporters, Inc.; Federal Energy Regulatory Comm'n--Recon., B-245149.2; B-245149.3, Apr. 6, 1992, 92-1 CPD ¶ 347.

<sup>4</sup>(...continued)

documentation to which the protester refers was a letter from FWS to the Army Corps of Engineers dated September 23, 1993, which stated that in addition to the \$2,980,000 available for award during fiscal years 1993 and 1994, FWS had been assured that \$300,000 would become available in fiscal year 1995, and that FWS planned to use the combined total of \$3,280,000 in selecting an awardee.) The protester maintains that until it received this document, it had no reason to question the Corps' assertion that insufficient funding was available.

We think that Bollinger's protest of the cancellation of IFB -0006 is untimely and will not consider it. Although the protester contends that it had no reason to question the agency's representation that funding was inadequate for an award, the fact is that it did question that representation: it protested the cancellation on this ground to the agency on May 19. The agency responded to the protester's objections in its decision dated September 8. If the protester wished to take issue with the agency determination regarding the propriety of the cancellation, it should have done so within 10 days after its receipt of the agency determination. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1994).

Here, the record--in particular, the results of the bidding under IFB -0006--clearly establishes that bids from two or more small businesses could be expected under IFB -0027 and does not reflect a reasonable basis for the conclusion that award at a fair market price could not be anticipated.

According to the contracting officer, she concluded that because no two small businesses had submitted responsive bids within the range of funds available for the first procurement, bids from at least two small businesses at a fair market price could not reasonably be expected under the second. Funding availability is not equivalent to fair market price, however. It is clear from the record that one of the problems with this procurement was, in fact, that the funding available was less than the fair market price of the work to be accomplished under the solicitation. In this regard, the approved government estimates for the 83-foot and 93-foot vessels were \$3.3 million and \$3.6 million, respectively, yet the amount budgeted by FWS for the acquisition was only \$2.98 million. Moreover, an Army Corps of Engineers memorandum furnished to us as part of the agency report reveals that the Corps concluded early in the procurement process that the funding budgeted by FWS was insufficient,<sup>5</sup> and that it therefore recommended that FWS obtain additional funding, which FWS did. (According to the Corps, FWS requested and programmed an additional \$300,000 for this acquisition into its fiscal year 1995 budget.)

We also fail to see any reasonable basis for the contracting officer's conclusion that Bollinger could be expected to reduce its price enough to come within the funding available for the acquisition, but that no other small businesses could be expected to do likewise. Peterson Builders' base price under the first procurement was not significantly higher than Bollinger's (\$66,720, compared with an overall acquisition value of approximately \$3 million). Moreover, since, as previously noted, FWS had sought additional funding for the acquisition, the level of funding available had increased.

Given that the contracting officer erroneously based her decision to withdraw the set-aside on a comparison of the bids received under the first IFB with the then-available funding, we have examined the record to see if there is

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<sup>5</sup>According to an internal Army Corps of Engineers memorandum, "early in the Project Definition Stage, [the Marine Design Center of the Corps] concluded that [the Fish and Wildlife Service] did not have sufficient funds for the vessel they envisioned."

other support for the agency's decision. We conclude that there is not.

The FAR defines fair market price as "a price based on reasonable costs under normal competitive conditions and not on lowest possible cost," and instructs agencies to determine the fair market price of small business set-asides in accordance with the reasonable price guidelines in FAR § 15.805-2. These guidelines permit the use of a variety of price analysis techniques--including comparison with the proposed prices received in response to the solicitation and comparison with the government estimate--in determining what a reasonable--or fair market--price would be.

Here, a comparison of the bids of Bollinger and Peterson Builders to the government estimates for both the 83-foot and the 93-foot vessels demonstrates that the prices of both bidders were reasonable. The agency contends that the approved government estimates of \$3.3 million for the 83-foot vessel and of \$3.6 million for the 93-foot vessel were inflated and that the correct estimates for the vessels were \$2.87 million and \$3.13 million, respectively. The Corps derived these figures by adjusting the approved estimates after receipt of Bollinger's agency-level protest. The agency explains that revision of the approved estimates downward by 14 percent was required because the estimates incorrectly included a 4-percent markup for inflation<sup>6</sup> and because they were calculated using the upper end of a 10-percent "range of accuracy" specified to MTI. Even assuming that revision of the estimate downward by 4 percent to delete the markup for inflation was appropriate--which would reduce the estimate to \$3.18 million for the 83-foot vessel and to \$3.47 million for the 93-foot vessel--we fail to understand why calculation of the estimate based on the lower end of the range of accuracy specified to MTI was any more appropriate than computation of the estimate based on the upper end of the range.<sup>7</sup> It would seem to us only

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<sup>6</sup>According to the Corps, it initially increased the estimate of \$3,183,337, which had been prepared by an independent contractor, Marine Technology Inc. (MTI), by 4 percent since it routinely includes a 4-percent markup for inflation when bids are not to be opened in the year in which the estimate was created. The Corps contends that such a markup was unwarranted here, however, since bids were opened during the same calendar year in which the estimate was created and since recent bid openings have not supported the need for an inflation or escalation rate.

<sup>7</sup>We also note that there is no evidence in the record that the estimate prepared by MTI in fact represented the upper end of such a range.

logical that if the reasonableness of a bid was to be evaluated based on a comparison with the government estimate, then any bid within the range of accuracy (i.e., \$2.87 million to \$3.18 million for the 83-foot boat and \$3.13 to \$3.47 million for the 93-foot boat) would be viewed as reasonable. Both Bollinger's and Peterson Builders' prices for the 83-foot vessel fell within this range, and both bidders' prices for the 93-foot vessel were in fact lower than the bottom end of the range.

For the second procurement, the agency adjusted its estimate to \$2.9 million; however, the agency concedes that this estimate was miscalculated. According to our calculations, correction of the error conceded by the agency would increase the estimate by \$250,151 to \$3,152,932,<sup>8</sup> an amount greater than the prices bid by both Bollinger (\$3,081,409) and Peterson Builders (\$3,115,983) for the 93-foot vessel under the first IFB. Moreover, the record shows that bids from both Bollinger and Peterson Builders within the range of the government estimate and within available funding, which has been increased to \$3,280,000, were in fact received in response to IFB -0027.<sup>9</sup>

We also note that in withdrawing the set-aside, the agency failed to comply with FAR § 19.506(a), which requires that before withdrawing a set-aside, the contracting officer consult with the agency's small and disadvantaged business utilization specialist (SADBU) and the SBA procurement center representative, if one is assigned. The record here does not show that either the SADBU or an SBA procurement center representative was notified of the decision to withdraw the set-aside prior to its effectuation. In this

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<sup>8</sup>The Corps calculated the second estimate by reducing MTI's estimate for the construction phase of the work by 20 percent to account for the range of accuracy that it thought had been specified to MTI. According to the Corps, it was later "revealed that due to customer sensitivity to conservative cost estimates, the range specified to MTI was -0% to +10%." The estimate for the construction phase of the work should therefore have been increased by 10 percent--or \$250,151--at a minimum.

<sup>9</sup>As previously noted, correction of the government estimate to account for the error conceded by the agency yields a sum of \$3.15 million. If this sum is further adjusted, as discussed above, to reflect a range of accuracy of 10 percent (as opposed to simply the lower end of that range), the government estimate would encompass a range of \$3.15 million to \$3.47 million. Both Bollinger's bid of \$3,181,982 and Peterson's bid of \$3,190,052 fall within this range--and both are, in fact, very close to its bottom end.

regard, a memorandum explaining the decision not to set aside the procurement was forwarded to the SADB on May 16, 1994--10 days after amendment 0001 to the IFB, which withdrew the set-aside, had been issued. Further, there is no evidence that the SADB concurred in the decision to withdraw the set-aside since the contracting officer entered her own signature in the blank where the SADB was supposed to sign. In addition, the memorandum did not explain that a set-aside was being withdrawn--i.e., that an earlier decision to set aside the procurement was being reversed--and it did not accurately summarize the basis for the decision not to set aside. (The memorandum stated that the low responsive bid from a small business under the earlier procurement had been rejected as unreasonable--which was not the case--and that the agency could therefore not be assured of receiving two reasonably priced bids from small businesses under this IFB.)

#### CONCLUSION AND RECOMMENDATION

Based on our review of the record in this case, we conclude that the contracting officer should reasonably have expected bids from at least two responsible small businesses and award at a fair market price and that she should therefore have set the procurement aside for small businesses.<sup>10</sup> Accordingly, we sustain the protest. We recommend that the IFB be canceled and reissued as a small business set-aside. In addition, we find that Bollinger is entitled to recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). In accordance with 4 C.F.R. § 21.6(f), Bollinger's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

  
Comptroller General  
of the United States

<sup>10</sup>Because we conclude that the Corps should have set aside this acquisition for exclusive small business participation, which would preclude the participation of a foreign shipyard in the competition, see 13 C.F.R. § 121.403(a), we need not address the protester's second ground of protest concerning the applicability of 10 U.S.C. § 7309 to the acquisition.

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